

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY

MARILYN W. WALKER, )  
individually and on behalf of )  
all others similarly situated )  
 ) Cause No. 5:08CV-29-R  
Plaintiffs, )  
 )  
 )  
 ) CLASS ACTION COMPLAINT  
 ) DEMAND FOR JURY TRIAL  
vs. )  
 )  
SPIN MASTER, LTD., and )  
SPIN MASTER, INC. )  
 )  
Defendants. )

**CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff Marilyn W. Walker, by counsel, on her own behalf and on behalf of all others similarly situated ("Plaintiff"), tender the following Class Action Complaint and Demand for Jury Trial:

**I.**

**JURISDICTION**

1. The United States District Court for the Western District of Kentucky has diversity jurisdiction over this Class Action lawsuit pursuant to 28 U.S.C. § 1332(d).
2. Upon information and belief, Spin Master, Ltd. is a corporate resident of Ontario, Canada and Spin Master, Inc. is a corporate resident of the State of Delaware. Plaintiff is a resident of the city of Murray and State of Kentucky. Pursuant to federal law, there must only be minimal diversity between the Plaintiff Class and the Defendants,

meaning that only a single member of the Plaintiff Class need be diverse from a single Defendant. *See* 28 U.S.C. §1332(d)(2)(A).

3. Upon information and belief, the amount in controversy exceeds the value of \$5,000,000.00, exclusive of interest and costs. *See id.* at §1332(d)(6).

## II.

### VENUE

4. Venue in this judicial district is proper under 28 U.S.C. §1391(a)(2) because a substantial part of the events or omissions giving rise to the claims herein described occurred within this judicial district.

## III.

### BACKGROUND

5. This is a lawsuit charging Spin Master, Ltd. and Spin Master, Inc. (collectively, “Spin Master” or “Defendants”) with the illegal marketing and selling of various “Aqua Dots’ ” products (e.g., “Aqua Dots Tray & Spray Pack,” “Aqua Dots Starter Pack,” “Aqua Dots Super Studio,” “Aqua Dots Themed Packs,” etc.) (collectively, “Aqua Dots” or “Toys”) to Plaintiff and the absent members of the class Plaintiff represents (hereinafter referred to as “Class Members”).

6. Defendants marketed, promoted, advertised, sold, distributed, and/or placed into the stream of commerce various Aqua Dots. Aqua Dots were marketed and advertised throughout the nation and in the state of Kentucky as being safe for children.

Moreover, Aqua Dots were sold in toy stores, department stores and specialty shops throughout the nation and the State of Kentucky.

7. Spin Master engaged in an aggressive marketing campaign specifically targeting young children. Spin Master ensured that our Nation's children and child care-givers, including those in the State of Kentucky, were inundated with marketing and promotional information regarding Aqua Dots with the intention to induce Plaintiff and Class Members to purchase the products.

8. Plaintiff and Class Members purchased these Toys believing, based upon Defendants' representations, that the product was safe for their children and grandchildren.

9. On or about November 7, 2007, Defendants issued a recall of Aqua Dots. By design, Aqua Dots were coated with a substance that causes the beads to stick to each other when water is added. However, as studies have now documented, this same substance contains a chemical that becomes highly toxic once ingested and metabolized. Children who swallow the beads can become comatose, develop respiratory depression, fall into seizures, and possibly die.

10. According to Associated Press Reports, the toys, which were produced in China, were supposed to be manufactured (and, indeed, were labeled by Spin Master as) utilizing 1,5-pentanediol, a nontoxic compound found in glue, but in fact contained the harmful 1,4-butanediol, a significantly cheaper chemical compound which is widely used

in cleaners and plastics. The Food and Drug Administration has declared the latter chemical a Class I Health Hazard, meaning it can cause life-threatening harm.

11. Spin Master recalled all Aqua Dots sold after April 2007. Published reports indicate that approximately 4.2 Million Aqua Dots have been recalled at this time.

12. Spin Master requested that retailers remove all of the recalled Aqua Dots from their shelves and requested that consumers immediately remove all Aqua Dots from the Class Members' children.

13. If Plaintiff and the Class Members had known the true nature of Aqua Dots - i.e. the incredible health risk the Toys present to their children and grandchildren - they would not have purchased the Aqua Dots, nor would they have allowed their children and grandchildren to play with the dangerous Toys.

14. The Toys were manufactured in China, and Spin Master failed to adequately screen and test the Aqua Dots, ignoring the threat that these Toys presented to children.

15. Despite presenting Plaintiff's and the Class Members' children with a product that poses the risk of respiratory depression, seizure, and death, Spin Master has not offered to refund the consumers' money. Instead, Spin Master has offered a "replacement" toy from Spin Master to compensate consumers.

16. This offer is neither an appropriate nor acceptable means of compensating the Plaintiff and Class Members for the fraud that was committed upon them and the danger that their children and grandchildren were faced with..

17. Plaintiff brings this action individually and on behalf of all others similarly situated to, *inter alia*, recover damages and require Spin Master to properly refund Plaintiff's and the Class Members' money that was spent on a defective and deceptively dangerous product.

**IV.**

**PARTIES**

18. Plaintiff, Marilyn W. Walker, is a resident of Murray, Calloway County, Kentucky. She is the grandparent of 5-year-old A.M.C. Plaintiff purchased Aqua Dots toys for A.M.C. from Wal-Mart in the Fall of 2007, on or about the 1<sup>st</sup> day of November. Plaintiff would not have purchased the Aqua Dots had she known of the tremendous health risk the Toys presented to her grandchild.

19. Defendant Spin Master, Ltd. is a corporate resident of Ontario, Canada.

20. Defendant Spin Master, Inc. is a corporate resident of the State of Delaware.

**V.**

**CLASS ACTION ALLEGATIONS**

21. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff seeks certification of a national Consumer Class (with the designation of statewide subclasses if the Court deems necessary and appropriate) defined as follows:

All Consumer residents and/or domiciliaries of the United States who purchased and/or paid for various Aqua Dots Toys included in the November 7, 2007 recall.

Excluded from the proposed Class are (i) any Defendant, any entity in which any Defendant has a controlling interest or which has a controlling interest in any Defendant, and Defendants' legal representatives, predecessors, successors, and assigns; (ii) the judicial offices to whom this case is assigned; and (iii) any member of the immediate families of excluded persons.

22. Should this court determine that a national Consumer Class would not satisfy the applicable requisites for class certification, Plaintiff alternatively seeks certification of a statewide class, defined as:

All Consumer residents and/or domiciliaries of Kentucky who purchased and/or paid for various Aqua Dots Toys included in the November 7, 2007 recall.

Excluded from the proposed Class are (i) any Defendant, any entity in which any Defendant has a controlling interest or which has a controlling interest in any Defendant, and Defendants' legal representatives, predecessors, successors, and assigns; (ii) the judicial offices to whom this case is assigned; and (iii) any member of the immediate families of excluded persons.

23. Plaintiffs are informed and believe that the Class consists of many thousands of persons throughout the United States, making individual joinder of all Class Members impracticable.

24. Questions of law and fact are common to the Plaintiff Class and predominate over questions affecting only individual members, including, *inter alia*, the following:

a. whether and when Spin Master knew or should have known of the dangerous defects in the Toys;

b. whether Spin Master knowingly, recklessly, and/or negligently concealed, suppressed or failed to disclose the health risks of their Toys from regulators, and the public;

- c. whether Spin Master's conduct violated state consumer protection statutes and state fraud and deceptive practice acts;
- d. whether Spin Master breached implied warranties covering its Toys;
- e. whether Spin Master acted negligently in the sale and promotion of their Toys;
- f. whether Spin Master was unjustly enriched at the expense of Plaintiffs and the Class;
- g. whether the Toys were inherently defective;
- h. whether the Toys presented a health risk to children; and,
- i. whether a national class or statewide classes, and/or other subclasses, are superior, within the requirements of Rule 23(b)(3), on any of the Class Claims.

25. Plaintiff's claims are typical of the claims of the Class Members as described above; the claims arise from the same course of conduct by Spin Master and the relief sought is common.

26. Plaintiff will fairly and adequately represent and protect the interests of all Class Members. Plaintiff will be represented by counsel competent and experienced in both consumer protection and class action litigation.

27. Class certification is proper under Federal Rule of Civil Procedure 23(b)(1)(A), because the prosecution of separate actions by individual Class Members

would create a risk of inconsistent or varying adjudications with respect to individual Class Members and potentially establish incompatible standards of conduct for Spin Master.

28. Class certification is proper under Federal Rule of Civil Procedure 23(b)(1)(B) because the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to individual Class Members which would, as a practical matter, be dispositive of the interest of the other members not parties to these adjudications and/or substantially impair their ability to protect these interests.

29. Class certification is proper under Federal Rule of Civil Procedure 23(b)(3), because common issue of law and fact predominate over any questions affecting only individual members of the Class, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

30. A class action is superior to other methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Furthermore, because the economic damages suffered by the individual Class Members may be relatively modest, albeit significant, compared to the expense and burden of individual litigation, it would be impracticable for Class Members to seek redress individually for the wrongful conduct alleged herein. There will be no difficulty in the management of this litigation as a class action.

31. Plaintiffs seek a class certification decision that, regardless of the applicable subsection of Rule 23 under which class treatment is granted, (1) preserves the right of

Class Members to exclude themselves from the Class under Rule 23(c)(2)(B), unless the Court makes a finding that Defendants' available assets and insurance constitute a traditional "limited fund" under the meaning of *Ortiz v. Fibreboard*, 527 U.S. 815, 816 (1999) and (2) if appropriate, grants class certification with respect to particular issues under 23(c)(4)(A).

**VI.**

**FIRST CAUSE OF ACTION**

(Defendants' Violation of the Kentucky Consumer Protection Act and the Similar Acts of the Various States)

32. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

33. Spin Master had a statutory duty to refrain from unfair or deceptive acts or practices in the design, development, manufacture, promotion and sale of their Toys.

34. Had Spin Master not engaged in the deceptive conduct described above, Plaintiff and the Class Members would not have purchased the Toys.

35. Spin Master's deceptive, unconscionable and/or fraudulent representations and material omissions to consumers and the public, including Plaintiff and the Class Members, constituted unfair and deceptive acts and practices in violation of the state consumer protection statutes listed below.

- a. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ala. Code § 8-19-1, *et seq.* ;
- b. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Alaska Stat. § 45.50.471, *et seq.* ;
- c. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ariz. Rev. Stat. § 44-1522, *et seq.* ;
- d. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ark. Code § 4-88-101, *et. seq.* ;
- e. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Cal. Civ. Code § 1770 et seq. and Cal Bus. & Prof. Code § 17200, *et seq.* ;
- f. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Colo. Rev. Stat. § 6-1-105, *et. seq.* ;
- g. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Conn. Gen. Stat. § 2-110a, *et seq.* ;
- h. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 6 Del. Code §§ 2511, *et seq.* and 2531, *et. seq.* ;
- i. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of D.C. Code § 28-3901, *et. seq.*;

- j. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Fla. Stat. § 501.201 *et seq.* ;
- k. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ga. Stat. §§ 10-1-372, *et seq.* , 10-1-392 and 10-1-420.
- l. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Haw. Rev. Stat. § 480-1, *et seq.* ;
- m. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Idaho Code § 48-601, *et seq.* ;
- n. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 815 ILCS §505/1, *et seq.* ;
- o. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ind. Code Ann. § 24-5-0.5-1, *et seq.* ;
- p. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Iowa Code § 714.16, *et seq.* ;
- q. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Kan. Stat. § 50-623, *et seq.* ;
- r. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ky. Rev. Stat. § 367.170, *et seq.* ;

- s. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of La. Rev. Stat. § 51:1401, *et seq.* ;
- t. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 5 Me. Rev. Stat. § 205A, *et seq.* ;
- u. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Md. Com. Law Code § 13-101, *et seq.* ;
- v. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mass. Gen. L. Ch. 93 A, *et seq.* ;
- w. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mich. Comp. Laws Ann. § 445.90 1, *et seq.* ;
- x. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Minn. Stat. §§ 325D.43, *et seq.* ; 325 F.67, *et seq.* ; and 325F.68 *et seq.* ;
- y. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Miss. Code Ann. § 75-24-1, *et seq.* ;
- z. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Vernon's Ann. Missouri Stat. § 407.010, *et seq.* ;
- aa. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mont. Code Ann. § 30-14-101, *et seq.* ;

bb. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Neb. Rev. Stat. § 59-1601, *et seq.*;

cc. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nev. Rev. Stat. Ann. § 598.0903, *et seq.* ;

dd. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.H. Rev. Stat. § 358-A:1, *et seq.* ;

ee. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.J. Rev. Stat. § 56:8-1, *et seq.* ;

ff. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.M. Stat. § 57-12-1, *et seq.* ;

gg. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.Y. Gen. Bus. Law §§ 349 *et seq.* and 350-e, *et seq.* ;

hh. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, *et seq.* ;

ii. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.D. Cent. Code §§ 51-12-01, *et seq.*, and 51-15-01, *et seq.* ;

- jj. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ohio Rev. Stat. § 1345.01, *et seq.*;
- kk. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Okla. Stat. § 15 751, *et seq.*;
- ll. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Or. Rev. Stat. § 6464.605, *et seq.* ;
- mm. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 73 Pa. Stat. § 201-1, *et seq.*;
- nn. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of R.I. Gen. Laws. § 6-13.1-1, *et seq.* ;
- oo. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of S.C. Code Laws § 39-5-10, *et seq.*;
- pp. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of S.D. Codified Laws § 37-24-1, *et seq.* ;
- qq. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Tenn. Code § 47-18-101, *et seq.* ;
- rr. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Tex. Bus. & Com. Code § 17.41, *et seq.*;

ss. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Utah Code § 13-11-1, *et seq.* ;

tt. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 9 Vt. § 2451, *et seq.* ;

uu. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Va. Code § 59.1-196, *et seq.*;

vv. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Wash. Rev. Code. § 19.86.0 10, *et seq.*;

ww. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of West Virginia Code § 46A-6-101, *et seq.* ;

xx. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Wis. Stat. § 100.20, *et seq.* ; and,

yy. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Wyo. Stat. § 40-12-101, *et seq.*

36. Plaintiff and members of the class relied upon Defendants' misrepresentations and/or omissions in buying the Defendants Toys.

37. Plaintiff will provide any required notice to appropriate entities regarding Defendants' unfair and deceptive trade practices.

38. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the Class Members have been damaged by paying for these Toys.

39. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the Class are entitled to compensatory damages, treble damages, attorneys' fees and cost of this suit.

**SECOND CAUSE OF ACTION**

(Defendants' Breach of the Implied Warranty of Merchantability)

40. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein.

41. Spin Master sold and promoted their Toys and placed them into the stream of commerce. Spin Master knew or had reason to know of the specific use for which the Toys were purchased and impliedly warranted that its Toys were of merchantable quality and fit for such use.

42. Plaintiff and the Class Members reasonably relied upon the expertise, skill, judgment, and knowledge of Spin Master and upon its implied warranty that their Toys were of merchantable quality and fit for the intended use.

43. Spin Master knew, should have known, or had reason to know that Plaintiff and the Class Members were influenced to approve and purchase their children's Toys because of Spin Master's expertise, skill, judgment, and knowledge in furnishing their Toys for that use.

44. Spin Masters' Toys were not of merchantable quality and were not fit for their intended use, because they contained substances dangerous to humans, especially small children.

a. Defendants breached the implied warranty that their Toys were of

merchantable quality and fit for such use in violation of Ala. Code § 7-2-314, *et seq.*

b. Defendants breached the implied warranty that their Toys were of

merchantable quality and fit for such use in violation of Alaska St. § 45.02.314, *et seq.*

c. Defendants breached the implied warranty their Toys were of

merchantable quality and fit for such use in violation of Ariz. Rev. Stat. Ann. § 47-2314, *et seq.*

d. Defendants breached the implied warranty that their Toys were of

merchantable quality and fit for such use in violation of Ark. Code Ann. § 4-2-314, *et seq.*

e. Defendants breached the implied warranty that their Toys were of

merchantable quality and fit for such use in violation of Cal. Comm. Code § 2314, *et seq.*

f. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Co. Rev. St. § 4-2-314, *et seq.*

g. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Conn. Gen. Stat. Ann. § 42a-2-314, *et. seq.*

h. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of 6 Del. C. § 2-314, *et. seq.*

i. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of D.C. Code § 28:2-314, *et. seq.*

j. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Fla. Stat. Ann. § 672.314, *et. seq.*

k. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Ga. Code. Ann, § 11-2-314, *et. seq.*

l. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Haw. Rev. Stat. § 490:2-314, *et. seq.*

m. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of *Id.* Code § 28-2-314, *et seq.*

n. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Ill. Comp. Stat. Ann. Ch. 810, 5/2-314, *et. seq.*

o. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Ind. Code Ann. § 26-1-2-314, *et. seq.*

p. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Iowa Code Ann. § 554.2314, *et. seq.*

q. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Kansas Stat. Ann. § 84-2-314, *et. seq.*

r. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Ken. Rev. Stat. Ann. § 355.2-314, *et. seq.*

s. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of, and is liable under La.

Civ. Code Ann. Art. 2520, *et seq.*

t. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of 11 Maine Rev. Stat. Ann. § 2-314, *et. seq.*

u. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Md. Code Ann., Com. Law § 2-314, *et. Seq.*

v. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Mass. Gen. Laws Ann. Ch. 106 § 2-314, *et. seq.*

w. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Mich. Comp. Laws Ann. § 440.2.314, *et, seq.*

x. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Minn. Stat. Ann. § 336.2-314, *et. seq.*

y. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Miss. Code Ann. § 75-2-314, *et. seq.*

z. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Missouri Rev. Stat. § 400.2-314, *et. seq.*

aa. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Mont. Code Ann. § 30-2-314, *et. seq.*

bb. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Nev. Rev. Stat. U.C.C. § 104.2314, *et. seq.*

cc. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of N.H. Rev. Stat. Ann. § 382-A:2-314, *et. seq.*

dd. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of N.J. Stat. Ann. § 12A:2-314, *et. seq.*

ee. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of N.M. Stat. Ann. § 55-2-314, *et. seq.*

ff. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of N.Y. U.C.C. Law 2-314, *et. seq.*

gg. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of N.C. Gen. Stat. Ann. § 25-2-314, *et. seq.*

hh. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of N.D. Stat. § 41-02-314, *et. seq.*

ii. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Ohio Rev. Code Ann, § 1302.27, *et. seq.*

jj. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of 12A Okla. Stat. § 2-314, *et. seq.*

kk. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Or. Rev. Stat. § 72.3140, *et. seq.*

ll. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of 13 Pa. Stat. Ann. § 2314, *et. seq.*

mm. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of R.I. Gen. Laws § 6A-2-314, *et. seq.*

nn. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of S.C. § 36-2-314, *et. seq.*

oo. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of S.D. Stat. 57A-2-314, *et. seq.*

pp. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Tenn. Code Ann. § 47-2-314, *et. seq.*

qq. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Tex. Bus. & Com. Code Ann. § 2.314, *et. seq.*

rr. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Ut. Code Ann. § 70A-2-314, *et. seq.*

ss. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Va. Code Ann. § 8.2-314, *et. seq.*

tt. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Vt. Stat. Ann. § 9A-2-314, *et. seq.*

uu. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Wa. Rev. Code § 62A.2-314, *et. seq.*

vv. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of W.Va. Code § 46-2-314, *et. seq.*

ww. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Wis. Stat. Ann. § 402.314, *et. seq.*

xx. Defendants breached the implied warranty that their Toys were of merchantable quality and fit for such use in violation of Wyo. Stat. § 34.1-2-314, *et. seq.*

45. As a direct and proximate cause of Defendants' breach of the implied warranty of merchantability, Plaintiff and the Class Members suffered ascertainable losses, injuries, and damages as specified herein in an amount to be determined at trial.

### **THIRD CAUSE OF ACTION**

(Unjust Enrichment)

46. Plaintiff incorporates by reference the preceding paragraphs as if they were fully set forth herein; however, this Cause of Action is expressly pled in the alternative of any contract-based or legal causes of action.

47. Defendants have been, and continue to be, unjustly enriched, to the detriment of and at the expense of Plaintiff and the Class Members, as a result of its unlawful and/or wrongful collection of, *inter alia*, the Plaintiff and the Class Members' payments for Defendants' Toys such that Defendants' retention of such payments is inequitable.

48. Defendants have unjustly benefited through the unlawful and/or wrongful collection of, *inter alia*, payments for Defendants' Toys, and continue to so benefit to the detriment and at the expense of the Plaintiff and the Class Members.

49. Accordingly, Defendants should not be allowed to retain the proceeds from the benefits conferred upon it by the Plaintiff and the Class Members, who seek

disgorgement of Defendants' unjustly acquired profits and other monetary benefits resulting from its unlawful conduct, and seek restitution and/or rescission for the benefit of Plaintiff and the Class Members, in an equitable and efficient fashion to be determined by the Court.

50. Plaintiff and the Class Members are entitled to the imposition of a constructive trust upon Defendants such that its enrichment, benefit and ill-gotten gains may be allocated and distributed equitably by the Court to and/or for the benefit of Class Members.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, for herself and all others similarly situated, respectfully requests that this Court enter a judgment against Defendants and in favor of Plaintiff, and grant the following relief:

A. Determine that this action may be maintained as a class action with respect to a national class or with subclasses corresponding to the several states' laws, or, in the alternative, a Kentucky statewide class, pursuant to the appropriate subsections of Rule 23 of the Federal Rules of Civil Procedure; that the court certify a class action with respect to particular issues if appropriate, and that the Court designate and appoint Plaintiff and counsel to serve as Class Representatives and Class Counsel;

B. Declare, adjudge and decree the conduct of the Defendants as alleged herein to be unlawful;

C. Grant Plaintiff and Class Members awards of actual, compensatory, punitive and/or exemplary damages in such amount to be determined at trial and as provided by applicable law;

D. Grant Plaintiff and Class Members their costs of suit, including reasonable attorneys' fees, and expenses as provided by law; and,

E. Grant Plaintiff and Class Members such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

**DEMAND FOR TRIAL BY JURY**

Plaintiff, by counsel, requests a trial by jury on those causes of actions and requests for relief set forth herein.

Respectfully submitted:

GREGORY, EASLEY & ERNSTBERGER

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## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<b>I. (a) PLAINTIFFS</b>		<b>DEFENDANTS</b>		
<p><b>(b)</b> County of Residence of First Listed Plaintiff _____  <small>(EXCEPT IN U.S. PLAINTIFF CASES)</small></p>		<p>County of Residence of First Listed Defendant _____  <small>(IN U.S. PLAINTIFF CASES ONLY)</small></p>		
<p><b>(c)</b> Attorney's (Firm Name, Address, and Telephone Number)</p>		<p>Attorneys (If Known)</p>		
<b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)		<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)		
<input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)		Citizen of This State <input type="checkbox"/> PTF <input type="checkbox"/> DEF <input type="checkbox"/> 1 <input type="checkbox"/> 1 Incorporated or Principal Place of Business In This State <input type="checkbox"/> PTF <input type="checkbox"/> DEF <input type="checkbox"/> 4 <input type="checkbox"/> 4		
<input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity <small>(Indicate Citizenship of Parties in Item III)</small>		Citizen of Another State <input type="checkbox"/> 2 <input type="checkbox"/> 2 Incorporated and Principal Place of Business In Another State <input type="checkbox"/> 5 <input type="checkbox"/> 5		
		Citizen or Subject of a Foreign Country <input type="checkbox"/> 3 <input type="checkbox"/> 3 Foreign Nation <input type="checkbox"/> 6 <input type="checkbox"/> 6		
<b>IV. NATURE OF SUIT</b> (Place an "X" in One Box Only)				
<b>CONTRACT</b>	<b>TORTS</b>	<b>FORFEITURE/PENALTY</b>	<b>BANKRUPTCY</b>	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
<b>REAL PROPERTY</b>	<b>CIVIL RIGHTS</b>	<b>PRISONER PETITIONS</b>	<b>SOCIAL SECURITY</b>	<b>OTHER STATUTES</b>
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>Habeas Corpus:</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
			<b>FEDERAL TAX SUITS</b>	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/ Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>V. ORIGIN</b> (Place an "X" in One Box Only)				Appeal to District Judge from Magistrate Judgment <input type="checkbox"/> 7
<input type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed from State Court <input type="checkbox"/> 3 Remanded from Appellate Court <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from another district (specify) _____ <input type="checkbox"/> 6 Multidistrict Litigation				
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):				
VI. CAUSE OF ACTION Brief description of cause:				
<b>VII. REQUESTED IN COMPLAINT:</b>		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	<b>DEMAND \$</b>	CHECK YES only if demanded in complaint: <b>JURY DEMAND:</b> <input type="checkbox"/> Yes <input type="checkbox"/> No
<b>VIII. RELATED CASE(S) IF ANY</b>		(See instructions): JUDGE	DOCKET NUMBER	
DATE SIGNATURE OF ATTORNEY OF RECORD				

## FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.